Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

MICHAEL L. SCHWARTZ,

Petitioner,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the face of the plaintiff's state court Petition create an amount in controversy in excess of the required statutory amount in 28 USC § 1332?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Michael L. Shwartz ("Mr. Shwartz"), an individual.

Respondent: American Express Travel Related Services Company, Inc. ("AETRS"), a New York corporation.

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OPINIONS BELOW

On January 18, 2001, Michael Shwartz filed a petition in the Civil District Court for the Parish of Orleans seeking relief for the negligent infliction of emotional distress caused by American Express Travel Related Services' (hereinafter, "AETRS") arbitrary termination of his credit privileges. On March 12, 2001, AETRS filed a Notice of Removal in the United States District Court for the Eastern District of Louisiana. The Notice stated that jurisdiction was proper under 28 U.S.C. § 1332, and simply concluded that "[u]pon information and belief, the amount in controversy exceeds the sum of Seventy-Five Thousand Dollars."

On February 15, 2002, AETRS filed a counterclaim seeking the payment of alleged balances on Mr. Shwartz's credit cards. On March 6, 2002, Mr. Shwartz denied the allegations in the counterclaim on the basis that AETRS was a bad-faith obligee under Louisiana law. Subsequently, on June 18, 2002, AETRS filed a Motion for Summary Judgment. The District Court granted AETRS' Motion in its Order and Reasons dated July 22, 2002.

On June 5, 2003, the Court of Appeal for the Fifth Circuit held that the face of the plaintiff's petition revealed that the jurisdictional amount in controversy was met. On July 10, 2003, that court denied Mr. Shwartz' petition for rehearing.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Eastern District of Louisiana is lacking, but was predicated below on 28 USC § 1441 and 28 USC § 1332.

Subject matter jurisdiction for the United States Court of Appeals for the Fifth Circuit was invoked through 28 USC § 1291.

Jurisdiction of this Court is invoked under 28 USC § 1254(1).

RELEVANT PROVISIONS

United States Constitution Article 3, Section 1.

28 USC § 1291.

28 USC § 1332.

28 USC § 1441.

Louisiana Code of Civil Procedure Article 893.

STATEMENT

In 1986, Mr. Shwartz established several credit accounts with AETRS. For approximately fourteen (14) years, Mr. Shwartz maintained an impeccable credit record and payment history with the company. For his record, he was awarded Platinum Card status. In February of 2000, AETRS arbitrarily terminated his credit.

On February 14, 2000, an AETRS representative contacted Mr. Shwartz regarding his Platinum card account. Without prior notification, the AETRS representative demanded to know if Mr. Shwartz was aware of the balance owed for the previous billing cycle, what was charged during the previous cycle, and the reasons for those charges. Mr. Shwartz, an avid baseball card collector, customarily charged his card purchases and paid his charges in full at

the end of each billing cycle. He told this fact to the representative and the representative admitted that Mr. Shwartz had never missed or even been late with a payment.

That notwithstanding, the representative demanded that Mr. Shwartz produce a personal financial statement. Mr. Shwartz stated that because an accountant handled all of his financial information, he would not be able to produce the requested documents with the urgency with which the representative demanded. At this, the representative replied that the accounts would have to be "shut down."

The only grievance about Mr. Shwartz that AETRS expressed was that his balance was "high." There were no missed payments and no charges were being contested. Mr. Shwartz offered, in lieu of financial statements, that the AETRS representative contact his banker and verify that Mr. Shwartz was not a credit risk. The AETRS representative replied that the offer was not sufficient and that the only way to satisfy the company would be to pay cash immediately. Mr. Shwartz immediately made arrangements to have $106,000.00 transferred to AETRS even though the bill was not yet due. Despite this accommodation, the AETRS representative told him that all accounts would "be cut off."

As a result of this arbitrary and capricious acceleration of payments and termination of his accounts, Mr. Shwartz suffered emotional damages. Mr. Shwartz suffered what has been described as shock. He currently suffers from depression, anxiety, and his personality has regressed into obsessive-compulsive behavior.

He has been treated by a professional since the incident and has agreed to take medication in an effort to improve

the levels of anxiety and depression. According to Mr. Shwartz's therapist, he suffers from Post Traumatic Stress Disorder as a result of the February 14, 2000 incident with AETRS.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE PLAINTIFF'S STATE COURT PETITION MEETS THE AMOUNT IN CONTROVERSY REQUIREMENT OF DIVERSITY JURISDICTION.

A. Standard of Review and applicable law

Federal Courts are courts of limited jurisdiction - limited by the Constitution and by the Congress. "The judicial power of the United States, shall be vested in a Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III § 1. The Constitution clearly gives Congress the authority to establish the jurisdiction of federal courts. And "once the lines are drawn, 'limits upon federal jurisdiction...must be neither disregarded nor evaded.'" Keene Corp. v. United States, 508 U.S. 200, 207, 113 S.Ct. 2035 (1993).

The basis for jurisdiction in this case is found in the removal statute, which in turn refers to the statutes granting original jurisdiction to federal courts. The statute at issue here is the diversity jurisdiction statute found at 28 U.S.C. § 1332. The "dominant note" of the diversity jurisdiction statute "is one of jealous restriction...[and]...relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." City of Indianapolis v. Chase Nat. Bank, 314 U.S. 63, 76, 62 S.Ct.15 (1941). In light of this policy, the diversity statute should be "strictly

construed." Id.

Furthermore a cause of action is presumed to lie outside the limited jurisdiction of federal courts, "and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377, 114 S.Ct. 1673 (1993). Federal Courts have an affirmative duty "to police the border of federal jurisdiction." Spielman v. Genzyme Corp., 251 F.3d 1, 4 (1st Cir. 2001). Appellate Courts share this duty with district courts. As will be shown herein, the district court lacked the power to hear this case at the time of removal.

B. The removal statute requires that the district court have original jurisdiction over the removed action.

The only basis for removal of a state court action to federal court is 28 U.S.C. § 1441, which reads in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States...

For AETRS' removal to be proper, the district court must have original jurisdiction over the action. As stated above, federal courts are courts of limited jurisdiction. Since this action is based on State law, for the district court to have original jurisdiction, the parties must be completely diverse and the amount in controversy must be greater than $75,000. See 28 U.S.C. § 1332.

In this case, Mr. Shwartz did not object to the removal of his case at the district court level, but that fact does not

grant the district court power to try the case. Mr. Shwartz may not confer original jurisdiction upon the district court by not making an objection. In addressing this issue, the Supreme Court has stated that:

"where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1971).

Mr. Shwartz concedes that the citizenship of the parties is completely diverse. Mr. Shwartz is a citizen of Louisiana, and AETRS is a citizen of New York. But Mr. Shwartz's claim never did meet the $75,000.00 minimum required to confer original jurisdiction upon the district court.

C. The removing party must prove that jurisdiction is proper.

When a state court action is removed to federal court "the removing party bears the burden of showing that federal jurisdiction exists and that removal was proper." Manguno v. Prudential Property and Casualty Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002); citing, De Aguilar v. Boeing Co., 47 F.3d 1404, 1408 (5th Cir. 1995). The claims in the state petition at the time of removal govern whether the district court has jurisdiction over the action. See Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 264 (5th Cir. 1995).

A reviewing court should refer to the state court petition to determine the amount in controversy. See, St. Paul

Reinsurance Co., Ltd. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1995). But plaintiffs in Louisiana are prohibited from specifically pleading their damages. See, La.Code Civ. Proc. art. 893(A)(1). This Court has previously resolved this problem. In Manguno, this Court stated: "where, as here, the petition does not include a specific monetary demand, [the removing party] must establish by a preponderance of the evidence that the amount in controversy exceeds $75,000.00. 276 F.3d at 723; See also, De Aguilar, 47 F.3d at 1412.

The removing party can meet this requirement in two ways. Manguno, 276 F.3d at 723. First, if "it is apparent from the face of the petition that the claims are likely to exceed $75,000." Id. Second, if "the defendant sets forth 'summary judgment type evidence' of facts in controversy that support a finding of the requisite amount." Id. If the removing party is successful in proving that the jurisdictional amount is met, then the burden shifts to the remanding party to prove to a legal certainty that the jurisdictional amount is not met. See, De Aguilar, 47 F.3d at 1411-12.

D. AETRS has not met its burden, and Mr. Shwartz's state-law cause of action should be remanded.

As required by Louisiana law, Mr. Shwartz's state court petition does not contain a specific averment of Mr. Shwartz's damages. See La.Code Civ. Proc. art. 893 (A)(1). Instead, the petition asks for "reasonable" damages to compensate Mr. Shwartz for emotional damages caused by a breach of contract. See Petition at ¶13-16. The face of this suit makes clear that the amount in controversy was never $75,000.00. If the claim here is found to have more than $75,000.00 in controversy, then the federal courts will become a dumping ground for all contract disputes. Such

an outcome was not intended by Congress and not compatible with the "dominant note" of the diversity jurisdiction statute, which is one of "jealous restriction...[and]...relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." City of Indianapolis, 314 U.S. at 76. The business between Mr. Shwartz and AETRS intrinsically belongs to the state court and this Court should vacate the district court's order and remand to the Civil District Court for the Parish of Orleans.

Even if this Court is not persuaded that the face of the petition establishes that the amount in controversy is less than $75,000.00, this Court should nevertheless remand to the U.S. District Court. The second way that a removing party may meet his burden is by presenting "summary judgment type evidence." Manguno, 276 F.3d at 723. But here the district court did not develop a record as to the issue of the amount in controversy. Accordingly, this Court has no "summary judgment type evidence" to review. Id. Since the record contains no factual findings as to the jurisdictional amount, this Court should remand to the United States District Court for the Eastern District of Louisiana for a development of those facts. See Williams v. Best Buy Co., 269 F.3d 1316, 1318 (11th Cir. 2001).

CONCLUSION

For the foregoing reasons, Petitioner, Michael Shwartz, respectfully requests this Court grant this Writ Application to the United States Court of Appeals for the Fifth Circuit and reverse the judgment of the trial court as affirmed by the Fifth Circuit and remand this matter to the Civil District Court for the Parish of Orleans. Alternatively, Mr.

Shwartz requests this Court vacate the judgment of the trial court and remand this matter to the United States District Court for the Eastern District of Louisiana for an elaboration of the evidence as required by Manguno.

Respectfully submitted,

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No. 02-30836

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL L. SCHWARTZ
Plaintiff - Appellant

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC.
Defendant - Appellee

Appeal from the United States District Court
For the Eastern District of Louisiana (01-CV-646)

June 5, 2003

Before DAVIS, BENAVIDES, Circuit Judges, and RESTANI,* District Judge

PER CURIAM : **

Michael L. Schwartz ("Schwartz") appeals the district court's grant of summary judgment in favor of American Express Travel Related Service Company, Inc. ("AETRS") in his suit for damages associated with AETRS's alleged unlawful cancellation of his lines of credit. Schwartz contends that the district court's judgment must be vacated for lack of subject matter jurisdiction and the suit remanded to state court.

Schwartz filed a petition in the Civil District Court for the Parish of Orleans seeking relief for the "severe anxiety, emotional distress, humiliation and embarrassment both past, present and future" he

suffered, as well as past and present medical expenses incurred as a result of AETRS's termination of his credit. Schwartz also asserted an independent claim for intentional infliction of emotional distress. AETRS removed the suit to federal court on March 21, 2001, without objection. AETRS filed a counterclaim seeking payment of the balances on Schwartz's cards, and Schwartz filed an amended complaint alleging that he also suffered "substantial financial loss as a result of American Express's misrepresentation." In his deposition testimony, Schwartz alleged that as a result of his mental instability he lost a potential sale of his restaurant, the Camellia Grill in New Orleans. AETRS filed a Motion for Summary Judgment, and the district court granted summary judgment in favor of AETRS.

The appellate court reviews the question of subject matter jurisdiction de novo. Hussain v. Boston, Old Colony Insurance. Co., 311 F.3d 623, 629 (5th Cir. 2002).

A state court action may be removed to federal court under 28 U.S.C. § 1441. That statute provides in relevant part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(emphasis added). "The removing party bears the burden of showing that federal jurisdiction exists and that removal was proper." Manguno v. Prudential

Property and Cas. Insurance. Co., 276 F.3d 720, 723 (5th Cir. 2002) (citing De Aguilar v. Boeing Co., 47 F.3d 1404, 1408 (5th Cir. 1995) .

"To determine whether jurisdiction is present for removal, we consider the claims in the state court petition as they existed at the time of removal." Manguno at 723 (citing Cavallini v. State Farm Mut. Auto Insurance. Co., 44 F.3d 256, 264 (5th Cir. 1995)). "Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand. " Manguno at 723 (citing Acuna v. Brown & Root, Inc., 200 F.3d 335, 339 (5th Cir. 2000)). However, the Supreme Court has explained that:

where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filled in that court.

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1972). In such a case, the appellate court should review the pleadings as they existed at the time the district court entered judgment. Kidd v. Southwest Airlines Co., 891 F.2d 540, 546 (5th Cir. 1990) (internal citations omitted).

In Caterpillar, Inc. v. Lewis, the Supreme Court held that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." 519 U.S. 61, 66 (1996). In that case, complete diversity was lacking at the time Caterpillar removed the case to federal court. One of the plaintiffs objected to the removal and moved

to have the case remanded to state court. The district court denied the motion to remand. Prior to trial, the non-diverse parties settled. Following a jury trial, the district court entered judgment in favor of Caterpillar. The Court read Grubbs to say that "an erroneous removal need not cause the destruction of a final judgment, if the requirements of federal subject-matter jurisdiction are met at the time the judgment is entered." Id. at 73.

AETRS removed this case based on diversity jurisdiction. Both parties concede that diversity exists, and that the jurisdictional issue on appeal is whether the case meets the $75,000 requirement for jurisdiction. Schwartz argues that AETRS did not prove that the amount in controversy met the $75,000 threshold. Although Grubbs and Caterpillar dealt with cases where subject-matter jurisdiction was lacking at the time of removal due to a lack of complete diversity, the same reasoning should apply to cases where the $75,000 threshold is not met before the case is removed.

A reviewing court should refer to the State court petition to determine the amount in controversy. See St. Paul Reinsurance Co. Limited. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1998). However, Louisiana prohibits the specific pleading of damages. LA. CODE CIV. PROC. Art 893(A)(1). This court held in Manguno, that "where, as here, the petition does not include a specific monetary demand, [the removing party] must establish by a preponderance of the evidence that the amount in controversy exceeds $75,000." 276 F.3d at 723. "This requirement is met if (1) it is apparent from the face of the petition that the claims are likely to exceed $75,000, or, alternatively, (2) the defendant sets forth 'summary judgment type evidence' of facts in controversy that support a finding of the requisite amount." Id.

Viewing the pleadings as they existed at the time of judgment, it is apparent that the claims were likely to exceed $75,000. Schwartz sought damages for his past and future mental suffering and medical expenses. Additionally, he alleged that AETRS caused him intentional infliction of emotional distress and "substantial" financial losses. Thus, at the time the district court rendered judgment, the court would have had original jurisdiction had the suit been filed there. Therefore, Schwartz's jurisdictional argument is without merit, and we AFFIRM the district court's grant of summary judgment in favor of AETRS.

AFFIRMED.

FOOTNOTES

*Judge, U.S. Court of International Trade, sitting by designation.

** Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

July 18, 2003

Ms Loretta Whyte, Clerk
Eastern District of Louisiana, New Orleans United States District Court
Room C-151
500 Camp Street
New Orleans, LA 70130

No. 02-30836 Shwartz v. Amer Exprs Travel USDC No. 01-CV-646-K

Enclosed, for the district court only, is a certified copy of the judgment issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits to be returned.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Renee S. McDonough, Deputy Clerk
504-310-7673

CC: (letter only)
Honorable Stanwood R Duval Jr
Mr Mitchell J Hoffman
Mr Robert Louis Walsh
Mr Antonio D Robinson

MDT-1

No. 02-30836
D.C. Docket 01-CV-646-K

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL L SHWARTZ
Plaintiff - Appellant

V.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC
Defendant - Appellee

July 18, 2003

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before DAVIS, BENAVIDES, Circuit Judges, and RESTANI*, Judge.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE : July 18, 2003

FOOTNOTES

*Judge, United States Court of International Trade, sitting by desigantion.

CIVIL ACTION NO. 01-646
SECTION "K"(2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MICHAEL SHWARTZ

VERSUS

AMERICAN EXPRESS TRAVEL CO.

April 8, 2003

ORDER AND REASONS

Before this Court is the plaintiff, counter-claim defendant Michael Shwartz, who submits his objections to the Magistrate Judge's Findings and Recommendation which found that the defendant, counter-claim plaintiff was entitled to $30,535.00 in reasonable attorneys fees. (See Rec. Doc. 47, Findings and Recommendation, and Rec. Doc. 48, Plaintiffs Objections).

Facts and Background

As recounted in the Court's July 22, 2002 Order and Reasons, in 1986 Michael Shwartz opened a credit card account with American Express Travel Related Services Company, Inc. ("AETRS") and established three accounts, including: (1) an Optima Card Account, (2) a Platinum Card Account, and (3) an AETRS Corporate Card Account. According to the terms of the Platinum Card account, AETRS was authorized to revoke a card member's privileges at any time. Specifically, the Platinum Card Agreement stated that AETRS could revoke credit card privileges of a card member "whether

or not the [card member] has breached the agreement and without giving [the cardmember] notice.[1] Similarly, the Optima Card Agreement entered into between Shwartz and AETRS stated that:

[W]e may suspend or cancel your Optima Card privileges at our sole option subject to applicable law, at any time with or without cause and without giving you notice. Any such action on our part will not cancel your obligation to pay us the outstanding balance, Finance Charges and other charges due on your card account... You agree to pay all such obligations despite any suspension or cancellation of your Card Account.[2]

In February 2001, AETRS became concerned with the excessively high balances on Shwartz's Platinum Card account and demanded that he produce various personal financial information with respect to items purchased on that account.[3] Shwartz objected to providing such information, but assured the AETRS representative that he would continue to timely make all payments. He reminded AETRS that in his fourteen years as a customer with American Express, he had never missed or been late with a payment.[4] Shwartz also suggested that AETRS contact his banker to verify that he had a line of credit sufficient to cover the outstanding charges.[5] AETRS did not accept plaintiff's offer and advised Shwartz that: (1) it could not assure itself that he could afford to pay the outstanding charges and (2) his accounts would be "cut off." [6] AETRS also demanded payment of charges not yet billed.

Thereafter, Shwartz filed a complaint with this Court alleging that AETRS had unlawfully terminated his credit card privileges. Shwartz sought damages for embarrassment, humiliation, severe anxiety, and emotional distress which required treatment with a

mental health professional following the termination of his accounts.

AETRS subsequently fled a counterclaim denying petitioner's allegations and demanding that Shwartz pay the outstanding balance on his Optima and Platinum Card Accounts- an amount totaling $68, 879.53. AETRS also requested the following relief: (1) damages equaling the amount which Shwartz has been "unjustly enriched" and (2) the cost of the proceedings, and (3) attorneys fees.

On June 18, 2002, AETRS filed a motion for summary judgment, (Rec. Doe. 18), arguing that there existed no genuine issue of material fact as to Shwartz's claims and AETRS's counterclaim. It argued (1) that AETRS did not breach any contract it had with Shwartz when it cancelled his Optima and Platinum Card accounts because the terms of both contracts entitled AETRS to revoke the privileges of the card member for any reason, (2) that there was no genuine issue of fact as to its counterclaim for the outstanding balances on the cards, and (3) no issue of fact as to AETRS's entitlement to attorneys' fees.

This Court granted AETRS's motions for summary judgment, dismissing Shwartz's claim with prejudice and entitling AETRS to prevail on its counterclaim. The Court then entered a judgment against Shwartz and in favor of AETRS for $68,879.53 plus costs and attorneys fees. (See Rec. Doc. 44).

Thereafter, AETRS filed a Motion for Attorneys Fees, (Rec. Doc. 32), and proposed that 530,535.00 was the amount it was reasonably entitled to recover under the lodestar method of calculating attorneys fees. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714,

717-19 (5th Cir. 1974). Along with its motion, AETRS attached a lengthy exhibit which enumerated the hours billed in connection with this matter and the applicable hourly rates which varied depending upon which attorney or law clerk performed the work.

In his Findings and Recommendation, the Magistrate Judge held that AETRS should receive its reasonable attorney's fees in the full amount of $30,535.00. Applying principles of Delaware and Louisiana law, he found that the fee AETRS requested was reasonable and that the plaintiffs arguments against the award were meritless. Additionally, the Magistrate Judge held (1) that AETRS was entitled to attorneys' fees for its effort defending Shwartz's suit, as well as for the amounts it incurred in collecting the outstanding balances on the accounts, (2) that AETRS was not required to segregate its fees between the defense of the plaintiff's suit and collection of the amounts owed on its counterclaim, and (3) the language of the credit card agreements pertaining to AETRS's entitlement to attorney fees was broad enough to encompass fees for defending Shwartz's suit and for bringing its counterclaim to collect the balance.

Shwartz's main contention in his Objections to the Magistrate Judge's Findings and Recommendation is that the award is excessively higher than amount the parties agreed to in the written credit card agreements. The award, he argues, is contrary to law because in all the cases the Magistrate Judge cited, courts use their discretion to reduce unreasonable attorney fee provisions in written contracts; they do not award a higher amount of attorneys fees than the written contracts indicates.

Standard of Review for Magistrate Judge's Finding and Recommendation

Magistrate judges are empowered by statute to preside over certain pretrial matters upon appointment by a district judge. 28 U.S.C. § 636(b)(1)(A); see also Rules Governing § 2254 Cases, Rule 10. A district court evaluating a magistrate judge's recommendation may adopt those portions of the recommendation to which no specific objection is made, as long as those sections are not clearly erroneous. See id.; Fed. R. Civ. P. 72(b). However, where a party makes "specific, written objections" within 10 days after being served with a copy of the magistrate's recommendations, the district court must undertake de novo review of those contested aspects of the report. 28 U.S.C. § 636(b)(1)(C); see also Fed. R. Civ. P. 72(b). The district judge may then "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b).

An award of attorney's fees is reviewed for abuse of discretion. Atari v. McNeal, 2002 WL 221613 * 1 (E.D. La. 218102). Factual findings are reviewed for clear error, but the conclusions of law underlying the award are reviewed de nova. Id.

Review of Shwartz's Objections

As noted earlier, Shwartz's main contention is that the Magistrate Judge's award of attorneys' fees is out of proportion with the parties' written agreements. This case involves two different credit cards with varying language. The agreements provide:

Optima Card:

Upon your default, and subject to any limitation or requirements of applicable law, you agree to pay all our reasonable costs, including reasonably attorneys' fees incurred by us (1) in collecting the balance due, including Finance Charges, if any, whether or not suit is brought against you, and (2) in protecting ourselves from any harm that we may suffer as a result of your default.

Platinum Card:

You agree to pay all court costs plus attorney's fees of 15% of the unpaid balance if we must refer your account to an attorney who is not our employee, subject to the law of your jurisdiction.

The balance on the Platinum card, as stipulated by the parties, is $62,734.63. Therefore, Shwartz argues that, according to the Platinum agreement, Shwartz should only be obligated to pay, at most, $9,410.20 (15% of the balance). Subtracting this amount from the Magistrate Judge's overall award of attorneys fees, $30,535.00, yields $21,124.80 in attorneys fees on the Optima card. The Optima card has a stipulated balance of $6,144.90. Shwartz argues that the award of $21,124.80 in attorneys' fees on a $6,144.90 balance is excessive and unreasonable because the award is over three times the balance and because the total award of attorneys fees is approximately half the balance on both cards.

A district court judge does not need to give effect to an agreement regarding attorneys fees, and has considerable discretion to inquire into its reasonableness. See Forbush v. J.C. Penney Co., 98 F.3d 817, 822 (5th Cir.1996). "A district court is not bound by

the agreement of the parties as to the amount of attorneys fees. The court must only consider whether the attorneys' fees proposed are reasonable." Id. (citations omitted). Further, the substantive right to receive attorneys fees is governed by state law in a diversity case. Atari v. McNeal, 2002 WL 221613 * 1 (E.D. La. 218102). Louisiana law allows courts to inquire into the reasonableness of attorney's fees as a part of their authority to regulate the practice of law.' Id. The factors a court may consider when assessing the reasonableness of attorney's fees are contained in Disciplinary Rule 2-106 of the Code of Professional Responsibility. Scott v. JS. Noel, 506 So. 2d 1313,1318 (2 Cir. La. 1987). The factors that determine the reasonableness of attorney's fees are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment would preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and the length of time of professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the service; and

(8) whether the fee is fixed or contingent.

Id.

The instant case calls for the Court to analyze whether it is reasonable to interpret the contracts as allowing for the costs of defending Shwartz's breach of contract claim.

The Platinum Card Agreement

The Platinum Card provides that the cardholder agrees to pay "all court costs plus attorneys' fees of 15% of the unpaid balance if we must refer your account to an attorney who is not our employee." Considering the factors set forth in DR 2-106, the Court finds that a fee of $9,410.20 on a balance of $62,734.63 is reasonable. The language of the Platinum Card agreement is unambiguous. The text does not provide for attorneys' fees for defending a breach of contract claim-it strictly limits recovery to a percentage of the balance on the card. Therefore, AETRS cannot recover defense costs pursuant to the language of the Platinum Card. Its recovery is limited to the fixed percentage in the agreements.

The Optima Card Agreement

The Optima Card agreement employs language that is broader than the language in the Platinum agreement. It states that upon default, the cardholder is liable for reasonable attorneys fees incurred "(1) in collecting the balance due, including Finance Charges, if any, whether or not suit is brought against you, and (2) in protecting ourselves from any harm that we may suffer as a result of your default."

Only one clear proposition can be deduced from the language of the first clause in the agreement: that AETRS can recover the attorneys fees incurred "collecting the balance due." The second clause which states that AETRS may collect attorneys fees incurred "in protecting ourselves from any harm that we may suffer as a result of your default" is ambiguous and does imply that AETRS may recover for costs defending against Shwartz' claim for breach of contract claim.

According to Louisiana law on the interpretation of contracts, "in case of doubt [as to the parties' intent] that cannot be other wise resolved, a contract must be interpreted against the party who furnished its text." See La. Civ. Code. Art. 2056; See Louisiana Gaming Corp. v. Kayell Enterprises, Inc., 35,297 (La. App. 2 Cir.1/ 15101), 804 So.2d 736. As a result, the second clause must be construed against the drafter, AETRS. The Court is not cloaked with the task of spinning thread into gold and cannot allow the drafter of an agreement to recover for something not expressly stated by the agreement's terms. The Court must interpret the Optima agreement, as it reads - allowing AETRS to collect reasonable attorneys fees incurred in the collection of its debt because it is not clear that "in protecting ourselves from any harm that we may suffer as a result of your default" includes defending against a claim brought by the plaintiff. AETRS has not demonstrated that defending a breach of contract claim is any way related to Shwartz's default. Moreover, the term "collecting the balance due," does not include defending against a breach of contract claim. Had the drafter intended such a meaning he or she could have crafted an agreement that specifically stated that the cardholder could be held responsible for attorneys' fees incurred in relation to any suit the cardholder brought.

Consequently, the Court agrees with Shwartz's argument that the attorneys' fees on the Optima Card are unreasonable because they include the legal costs incurred defending the Shwartz's claim.

Applying the factors set out in DR 2-106, this Court finds that an attorneys fee award of one-third of the balance on the Optima Card is reasonable.[8] This reduction reflects the equitable amount of attorney's fees that should be charged considering that (1) the amount involved was only $6,144.90, (2) the collection action itself was uncomplicated and not a novel issue of law, and (3) the fact that the attorney's fees award does not include the costs of defending against Shwartz's suit.

Accordingly,

IT IS ORDERED that the Findings and Recommendation of the Magistrate Judge is hereby MODIFIED.

FOOTNOTES

[1] Agreement between Platinum Card Member and AETRS; Motion for Summary Judgment, Exhibit A.

[2] Agreement between Optima Card Member and AETRS; Motion for Summary Judgment, Exhibit C.

[3] Motion for Summary Judgment, p.4.

[4] Opposition to Motion for Summary Judgment, p. 2-3.

[5] Opposition to Motion for Summary Judgment, p. 3.

[6] Opposition to Motion for Summary Judgment, p.3.

[7] The agreements both state that Delaware law should apply. Louisiana law and Delaware law are similar in the factors they apply to assess the reasonableness of fees. Additionally, neither party objected to the Magistrate Judge's use of Louisiana law to assess the reasonableness of the attorney's fees.

[8] The Magistrate Judge used of the Code of Professional Responsibility to determine whether the contractual fee was reasonable. Disciplinary Rule 2-106 provides certain guidelines Louisiana courts may apply in their review and control of attorney fees established by contract between the parties. It provides in pertinent part:

(A) a lawyer should not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of the fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment would preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and the length of time of professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the service; and

(8) whether the fee is fixed or contingent.

CIVIL ACTION NO. 01-646
SECTION "K"(2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MICHAEL SHWARTZ

VERSUS

AMERICAN EXPRESS TRAVEL CO.

April 8, 2003

JUDGMENT

Considering the Order and Reasons on this 7th day of April, 2003,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff's Objection to Magistrate's Recommendation on Attorneys' Fees is GRANTED.

IT IS FURTHER ORDERED that judgment is entered against Plaintiff, Michael Shwartz for attorneys' fees, and for Defendant, American Express Travel, Co. in the amount of $11,458.50, each party shall be responsible for its own costs relating to the determination of the amount of attorneys' fee issue.

New Orleans, Louisiana, this 7th day of April, 2003.

STANWOOD R. DUVAL, JR.

CIVIL ACTION NO. 01-646
SECTION "K"(2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MICHAEL SHWARTZ

VERSUS

AMERICAN EXPRESS TRAVEL CO.

July 22, 2002

ORDER AND REASONS

Before this Court is defendant, American Express's, Motion for Summary Judgment (rec. doc. 18). The Court has considered the motions and relevant law and finds that defendant's motion should be GRANTED.

Factual Background

In 1986 Michael Shwartz ("Shwartz") opened a credit card account with American Express Travel Related Services Company, Inc. ("AETRS") in 1986 and established three accounts, including: (1) an Optima Card Account, (2) a Platinum Card Account and (3) an AETRS Corporate Card Account. According to the terms of the Platinum Card account, AETRS was authorized to revoke a card member's privileges at any time. Specifically, the Platinum Card Agreement stated that AETRS could revoke credit card privileges of a card member "whether or not the [card member] has breached the agreement and without giving [the cardmember] notice.[1] Similarly, the Optima Card

Agreement entered into between Shwartz and AETRS stated that:

[W]e may suspend or cancel your Optima Card privileges at our sole option subject to applicable law, at any time with or without cause and without giving you notice. Any such action on our part will not cancel your obligation to pay us the outstanding balance, Finance Charges and other charges due on your card account... You agree to pay all such obligations despite any suspension or cancellation of your Card Account.[2]

In February 2001, AETRS became concerned with the excessively high balances on Shwartz's Platinum Card account and demanded that he produce various personal financial information with respect to items purchased on that account.[3] Plaintiff objected to providing such information but assured the AETRS representative that all payments would continue to be made timely and reminded him that in his fourteen years as a customer with American Express, he had never missed or been late with a payment.[4] Plaintiff also suggested that AETRS contact his banker to verify that he had a line of credit sufficient to cover the outstanding charges.[5] AETRS did not accept plaintiff's offer and advised Shwartz that: (1) it could not insure itself that he could afford to pay the outstanding charges and (2) his accounts would be "cut off."[6] AETRS also demanded payment of charges not yet billed.

Thereafter, plaintiff filed a complaint with this Court alleging that AETRS had unlawfully terminated his credit card privileges. Plaintiff sought damages for embarrassment, humiliation, severe anxiety, and emotional distress which required treatment with a mental health professional following the termination of his accounts.

AETRS subsequently filed a counter claim denying petitioner's allegations and demanding that Shwartz pay the outstanding balance on his Optima and Platinum Card Accounts - an amount totaling $68,879.53. AETRS also requested the following relief: (1) damages equaling the amount which Shwartz has been "unjustly enriched" and (2) the cost of the proceedings and AETRS's attorneys fees and costs to be borne by Shwartz.

Motion for Summary Judgment

Through the instant motion for summary judgment, AETRS claims that there are no genuine issues of fact as to plaintiff's claims or its counterclaim. Specifically, the motion reasons that: (1) AETRS did not breach any contract it had with Shwartz when it cancelled his Optima and Platinum card accounts because the terms of both contracts entitled AETRS to revoke the privileges of the card member (Shwartz) for any reason and with or without notice and (2) even though it did not need cause to terminate plaintiff's accounts, AETRS believed it had reason to cancel them after it (a) investigated plaintiff's underlying creditworthiness and (b) was unable to obtain information from Shwartz which would support the level of spending on the Platinum Card Account.

Further, the Motion claims that there is no genuine issue of fact as to AETRS's counterclaim seeking payment of the outstanding amounts owed on the Platinum and Optima accounts and attorneys fees because: (1) the contracts governing both accounts provide that the card member is responsible for paying all amounts charged to them-- despite the cancellation of the accounts and (2) Shwartz has not disputed the validity of any of the charges made on either account.

The Court notes that, while AETRS did not specify in either its Counterclaim or Motion for Summary Judgment, the Optima and Platinum agreements include attorneys fees provisions. Specifically, the Platinum Card Agreement provides, "[y]ou agree to pay all court costs plus attorney's fees of 15% of the unpaid balance if we must refer your account to an attorney who is not our employee. . . .[7] Similarly, the Optima Card Agreement provides, "[u]pon your default and subject to any limitations or requirements of applicable law, you agree to pay all our reasonable costs, including reasonable attorneys fees, incurred by us in collecting the balance due. . .whether or not suit is brought against you . . . ".[8]

In response, and citing no case law, plaintiff argues that summary judgment should be denied because, although the Platinum and Optima Card agreements provide that American Express can revoke Shwartz's credit card privileges at any time, with or without cause, those provisions are inconsistent with the equitable provisions of La. C.C. art. 2054 - as equity would require that Shwartz be given reasonable notice of the termination of his accounts. La. C.C. art. 2054 provides:

When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever law, equity or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

Thus, Shwartz contends that the provisions of the Platinum and Optima Card agreements, which give AETRS the latitude to revoke a card members privileges at any time, whether or not the card member has breached the agreement and without notice, are

inconsistent with the equitable principles of Art. 2054. For example, Shwartz argues that AETRS was in "bad faith" to terminate the account of an individual who had never missed a payment without making a reasonable inquiry into that individual's financial status. Further, plaintiff posits that AETRS's "failure to comply with the implied obligation of good faith as required by the laws of equity constitutes a breach of contract for which AETRS should be liable." [9]

Finally, as to ATERS's counterclaim, plaintiff argues that summary judgment should not be granted because: (1) AETRS's became a "bad faith obligee" when it unilaterally terminated Shwartz's credit accounts without prior notice and knowing that he had never missed a payment and (2) La. C.C. art. 2003 does not permit a "bad faith obligee" to recover any damages when its own bad faith has caused the obligor's failure to perform and requires an obligee's damages to be proportionately reduced when the obligee's negligence contributed to the obligor's failure to perform.

Analysis

Standard for Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "An issue is material if its resolution could affect the outcome of the action." Daniels v. City of Arlington, Texas, 246 F.3d 500, 502 (5th Cir. 2001).

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Stults v. Conoco, 76 F.3d 651, 656 (5th Cir.1996) (citation omitted). When the moving party has carried its burden under Rule 56(c), its opponent must do more that show there is some possible doubt as to the material facts. Rather, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,588 (1986); Beck v. Texas State Board of Dental Examiners, 204 F.3d 629, 633 (5th Cir. 2000).

In reviewing the motion, the Court considers the record as a whole, disregarding evidence that the jury is "not required to believe." Thomas v. Great Atlantic and Pacific Tea Company, Inc., 233 F. 3d 326, 329 (5th Cir. 2000). Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." Matsushita at 588. Finally, the Court notes that substantive law determines materiality of facts and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Resolution of Motion Before the Court

In the case at bar, the Court concludes that AETRS's motion for summary judgment should be granted because the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party.[10] First, it is unrefuted that (1) both the Platinum and Optima cards specifically permitted AETRS to revoke Shwartz's accounts for any reason (or no reason) and

with or without notice and (2) Shwartz presently owes $68,879.53 on those accounts. Also, plaintiff's reliance on La.C.C. arts. 2054 and 2003, in an attempt to raise a "genuine issue of material fact" is misplaced as: (1) art. 2054 only applies "when the parties made no provision for a particular situation" and in this case the parties specifically agreed on AETRS's authority to terminate Shwartz's accounts and (2) art. 2003 requires a finding that an obligee has acted negligently or in bad faith and this Court can not find that AETRS became a "bad faith obligee" merely by enforcing the terms of its credit card agreements.

Further, the Court notes that its decision to enforce cancellation provisions of the AETRS Credit Card agreements, is consistent with federal law. In Samuels v. Old Kent Bank, 1997 WL 458434 (N.D. I11. 1997), for example, Old Kent Bank ("Old Kent") issued MasterCard and Visa credit cards which included "termination" clauses similar to the ones at issue in the case at bar. Specifically, the Card Agreements permitted Old Kent to "add, change, or discontinue any or all cardholder services at any time and for any reason.. . . ". [11] [12] When Old Kent exercised its discretion to cancel one of the programs offered to its cardholders, plaintiff brought suit alleging, inter alia, that Old Kent had breached the contracts made with its card holders and violated the covenant of good faith and fair dealing.

However, the court determined that there had been no breach of contract in the "traditional sense" because the contracts clearly permitted Old Kent to cancel a cardholder's card or any of the programs it offered at any time.[13] Further, the court held that when the express terms of a contract govern the disputed issue, courts should not imply a covenant of good faith and fair

dealing to override or replace express contractual terms.[14] The Court reasoned that:

Since a termination without cause will almost always be charaterizable as "bad faith" termination, focus of the terminating party's state of mind will always result in the invalidation of unrestricted termination clauses. (internal citation omitted).

We of course recognize that cancellation of the program worked, at least collectively, a significant forfeiture on Old Kent cardholders. . . The fact remains, however, that the unrestricted termination provisions contained within the contract gave Old Kent the express authority to accomplish this forfeiture. These clear and unambiguous contractual provisions alone warrant dismissal of this claim. The only alternative would be judicial rewriting of the contact. Absent fraud or other aggravating circumstances, such judicial interference with freedom of contract is unacceptable and better left to the political branches. . . .[15]

The reasoning employed in Samuels is equally persuasive in the case at bar. The cancellation language of the Platinum and Optima agreements expressly allowed AETRS to cancel Shwartz's accounts for any reason. Thus, this Court will not rewrite either of the contracts to impose an obligation of good faith and fair dealing that was not agreed to by the parties.

Finally, the Court notes that AETRS's claim that it was at liberty to cancel Shwartz's credit accounts without notice is without merit. In Gray v. American Express Co., 743 F.2d 10, U.S. App. D.C. 10 (1984), the court held that the provision an American Express credit card agreement permitting American Express to revoke a cardholders use of a card at any without notice was

unenforceable. The court explained that such a provision would permit American Express to retroactively cancel irreversible transactions that the card holder had already completed after the cancellation but before the cardholder learned his card has been cancelled.

Nevertheless, the case at bar is distinguishable from Gray because: (1) plaintiff received verbal notice, through an AETRS representative, that his accounts would be "cut off' before they were cancelled and (2) there has been no allegation or proof that plaintiff incurred any obligations on either of his AETRS accounts after his card was cancelled but before he received verbal notice of the cancellation of his accounts.

Accordingly,

IT IS ORDERED THAT defendant's Motion for Summary Judgment is GRANTED and plaintiffs complaint shall be DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the matter of attorney's fees is referred to the magistrate for a report and recommendation pursuant to Rule 54(d)(1)(D).

New Orleans, Louisiana, this 22nd day of July, 2002.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] Agreement between Platinum Card Member and AETRS; Motion for Summary Judgment, Exhibit A.

[2] Agreement between Optima Card Member and AETRS; Motion for Summary Judgment, Exhibit C.

[3] Motion for Summary Judgment, p.4.

[4] Opposition to Motion for Summary Judgment, p. 2-3.

[5] Opposition to Motion for Summary Judgment, p. 3.

[6] Opposition to Motion for Summary Judgment, p.3.

[7] Motion for Summary Judgment, Exhibit A, p. 2

[8] Motion for Summary Judgment, Exhibit C.

[9] Opposition to Motion for Summary Judgment, p.5.

[10] The Court notes that according to Local Rule 56.2(E), "Each copy of the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which there exists a genuine material issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule." Because plaintiff did not comply with the requirements of Local Rule 56.2E, this Court deems defendant's Statement of Uncontested Material Facts as admitted.

[11] Samuels, at 6.

[12] The program at issue in Old Kent, the CardMiles Program, also provided a similar termination clause: "The CardMiles Program and benefits are offered at the sole discretion of Old Kent. Old Kent reserves the right to cancel, change, or temporarily suspend the CardMiles

program at any time without notice. This court result in the cancellation of any outstanding certificates."

[13] Samuels, at 6.

[14] Samuels, at 7. Also citing, Hubbard Chevrolet v. General Motors Co., 873 F.2D 873, 876 (5th Cir. 1989)(applying Michigan law to determine that the implied covenant of good faith and fair dealing would not be applied to override or contradict express contractual terms) and Bushwick- Decatur Motors v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir.1940)(upholding an at-will termination provision of a contract and explaining that "with a power of termination at will here so unmistakably clear, we certainly cannot assert that a limitation fo good faith was anything that the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take.").

[15] Samuels, at 8.

CIVIL ACTION NO. 01-646
SECTION "K"(2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MICHAEL SHWARTZ

VERSUS

AMERICAN EXPRESS TRAVEL CO.

July 22, 2002

JUDGMENT

Considering the forgoing Order and Reasons entered this day,

IT IS ORDERED, ADJUDGED, AND DECREED that defendant's Motion for Summary Judgment is GRANTED and plaintiff's complaint shall be DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the matter of attorney's fees is referred to the magistrate for a report and recommendation pursuant to Rule 54(d)(1)(D).

New Orleans, Louisiana, this 22nd day of July, 2002.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED

03 713 OCT 8 2003

In the

Supreme Court of the United States

MICHAEL L. SCHWARTZ,

Petitioner,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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CIVIL ACTION
NO. 01-646
SECTION "K" (2)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MICHAEL L. SHWARTZ

VERSUS

AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC.

FINDINGS AND RECOMMENDATION

Judgment has been entered in this case in favor of defendant, American Express Travel Related Services Co., Inc. ("American Express"), and against plaintiff, Michael L. Shwartz, (1) dismissing plaintiffs claims against defendant with prejudice and (2) awarding defendant $68,879.53, "plus costs and attorneys fees," on its counterclaims. Record Doc. No. 44 (emphasis added). In the judgment and the order upon which it was based, Record Doc. No. 28, the presiding district judge referred to me for report and recommendation the matter of the amount of attorney's fees to be awarded to defendant.[1]

As ordered, Record Doc. No. 30, American Express filed a motion for attorney's fees, supported by the declaration and billing statement of its attorney. Record Doc. No. 32. Shwartz filed a timely opposition

memorandum. Record Doc. No. 39. American Express received leave to file a reply memorandum. Record Doc. Nos. 40, 41. Following referral of the amount of attorney's fees to me, the parties entered into a joint stipulation that the amount of the judgment attributable to the Optima Card Account is $6,144.90 and the amount attributable to the Platinum Card Account is $62,734.63. Record Doc. No. 45.

Having considered the written submissions of the parties, the judgment, the record and the applicable law, and for the following reasons, IT IS RECOMMENDED that defendant be awarded $30,535.00 in reasonable attorney's fees.

I. PROCEDURAL AND FACTUAL BACKGROUND

Shwartz was a credit cardholder with American Express of both an Optima Card and a Platinum Card. Both credit accounts were governed by written agreements. He sued after American Express cancelled both his cards and demanded payment of his outstanding balances.

Shwartz brought this suit against American Express in Louisiana state court, alleging breach of contract and intentional infliction of emotional distress. Petition, attached to Record Doc. No. 1. Defendant removed the action to this court pursuant to the court's diversity jurisdiction. Notice of Removal, Record Doc. No. 1. Eleven months after the removal, American Express filed a counterclaim for breach of contract and attorney's fees and costs, pursuant to the court's supplemental jurisdiction. Counterclaim, Record Doc.

No. 7. Because the action in this court is based solely on diversity jurisdiction, state substantive law applies.

This court entered judgment in favor of American Express on its counterclaims for a total of $68,879.53 under two different credit card agreements, known in this litigation as the Optima Card Account and the Platinum Card Account.

As to defendant's right to collect attorney's fees from plaintiff, the Optima Card Agreement provides in relevant part:

Upon your default and subject to any limitation or requirements of applicable law, you agree to pay all our reasonable costs, including reasonable attorneys' fees incurred by us (1) in collecting the balance due, including Finance Charges, if any, whether or not suit is brought against you, and (2) in protecting ourselves from any harm that we may suffer as a result of your default.

Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. C (emphasis added).

The Platinum Card Agreement provides: "You agree to pay all court costs plus attorney's fees of 15% of the then unpaid balance if we must refer your account to an attorney who is not our employee, subject to the law of your jurisdiction." Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. A (emphasis added).

II. ANALYSIS

A. The Applicable Law

In their respective memoranda, American Express argues that federal law applies to determine the amount of attorney's fees owed, while plaintiff argues that Louisiana law applies. In its opposition memorandum, American Express concedes that Louisiana law may apply but asserts that the same result would obtain under Louisiana law as under federal law.

Neither party addresses the clear language of the two contracts at issue, both of which plainly state that they are governed by Delaware law. Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exhibits A, C; Defendant's Reply Memorandum in Support of Motion for summary judgment, Record Doc. No. 27, at p.1 n. l (acknowledging that both contracts state they are governed by Delaware law). Nonetheless, it appears to the court that Delaware law concerning awards of attorney's fees is substantially similar to Louisiana law.

Under Delaware law, "[i]n an action at law, a court may not order the payment of attorney's fees as part of costs to be paid by the losing party unless the payment of such fees is authorized by some provision of statute or contract. " Casson v. Nationwide Ins. Co.,, 455 A.2d 361, 370 (Del. Super. Ct. 1982) (citing Honaker v. Farmers Mut. Ins. Co., 313 A.2d 900 (Del. Super. Ct. 1973); J.J. White, Inc. v. Metropolitan Merch. Mart, 107 A.2d 892 (Del. 1954); Great Am. Indem. Co. v. State, 88 A.2d 426

(Del. Ch. 1952); Maurer v. International Re-Ins. Corp., 95 A.2d 827 (Del. Ch. 1953)).

In PVI, Inc. v. Ratiopharm GmbH, 253 F.3d 320 (8th Cir. 2001), the Eighth Circuit explained current Delaware law governing attorney's fee awards in contract cases.

> Despite [defendant's] contention that it is entitled to everything it owes or paid its attorneys because the contract allows for the recovery of "all . . . attorneys' fees," Delaware law limits fee awards, including awards made under contractual provisions similar in all relevant respects to this one, to those fees that are reasonably incurred in the prosecution of the action. The reasonableness of attorneys' fees is to be evaluated under the factors listed in canon 2, DR. 2-106(B), of the Delaware canons of professional responsibility. . . . Rule 1.5 of the Delaware rules of professional conduct [is] currently in effect and supersed[es] the canons of professional responsibility. . . .
>
> When attorneys' fees are awarded pursuant to a contract, moreover, the award of fees is limited to those specifically provided for in the contract.

Id. at 329-30 (citing Princess Hotels. Int'l, Inc. v. Delaware State Bar Assn. No. 95C-01-062,1998 WI, 283465, at *7 (Del. Super. Ct. Mar. 10,1998); Rock v. Short, 336 A.2d 219, 221 (Del. 1975); General Motors Corp. v. Cox, 304 A.2d 55, 57 (Del. 1973); Council of Wilmington Condo. v. Wilmington Ave. Assocs., L.P., No. Civ. A. 94C-09-004,1999 WL 1223792, at *2-3 (Del. Super. Nov. 3, 1999)).

Under the Delaware Professional Conduct Rule 1.5(a) the factors to be considered in determining the "reasonableness" of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyers performing the service; and (8) whether the fee is fixed or contingent.

Manubay v. Stanton Med. Bldg. Condo. Council. No. Civ. A. 1999-03-302, 2000 WL 33275029 (Del. Com. Pl. Jan. 5, 2000).

Similarly, under Louisiana law, "attorney fees are not allowed except where authorized by statute or contract." State Dept of Transp. & Dev. v. William 597 So. 2d 439, 441 (La. 1992) (citation omitted); accord Short v. Plantation Mgmt. Corp., 781 So. 2d 46, 65 (La. App. 1st Cir. 2000). "Louisiana Civil Code Article 2000[2] provides that if the parties have, by contract, expressly agreed that the obligor shall be liable for the obligee's attorney fees in an amount that is fixed or determinable, the obligee is entitled to collect that amount of attorney fees as stipulated in the written contract." Teche Bank & Trust Co. v. Willis, 631 So. 2d 644, 646-47 (La. App. 3d Cir. 1994).

Although "attorney fees are stipulated in a contract, and notwithstanding [La. Civ. Code] art. 2000, the courts may inquire into the reasonableness of the fee." Scott v. Noel, 506 So. 2d 1313, 1315 (La. App. 2d Cir. 1987) (citing Central Progressive Bank v. Bradley, 502 So. 2d 1017 (La. 1987); City of Baton Rouge v. Stauffer Chem. Co., 500 So. 2d 397 (La. 1987)); accord Teche Bank & Trust Co., 631 So. 2d at 646. "Courts may inquire as to the reasonableness of attorney fees as part of their prevailing, inherent authority to regulate the practice of law." Williamson, 597 So. 2d at 441-42 (citing City of Baton Rouge, 500 So. 2d at 397; Leenerts Farms, Inc. v. Rogers, 421 So. 2d 216 (La. 1982)). In all cases, an attorney's right to "a recovery is subject to the court's authority to review excessive or unearned fees." Francis v. Hotard, 798 So. 2d 982, 986 (La. App. 1st Cir. 2001).

Thus, this court must examine the reasonableness of the amount before making an attorney's fee award, even if the amount of fees is stipulated in the contract. Fourchon Docks. Inc. v. Milchem Inc., 849 F.2d 1561, 1567-68 (5th Cir. 1988); Bankers Trust Co. v. Tonka Props., Inc., No. 96-3455,1997 WL 436248, at *2 (E.D. La. Aug. 1, 1997) (Fallon, J.); Oak Tree Savs. Bank v. Richland Corp., No. 92-2039, 1993 WL 185664, at *4 (E.D. La. April 3, 1993) (Sear, C.J.); Central Progressive Bank, 502 So. 2d at 1017; Schwegmann Bank & Trust Co. v. Dunne, 693 So. 2d 349, 354 (La. App. 4th Cir. 1997).

A "reasonable attorney's fee is determined by the facts of an individual case. In making awards for attorney's fees, the trial court is vested with great discretion, the exercise of which will not be interfered with except in a

case of clear abuse." Richardson v. Parish of Jefferson, 727 So. 2d 705, 707 (La. App. 5th Cir. 1999) (citation omitted) (emphasis added).

"The fundamental measure of attorney's fees is reasonableness, considering the factors set forth by Rules of Professional Conduct R.1.5." Mayeur v. Campbell, 666 So. 2d 366, 370 (La. App. 1st Cir. 1995). This court has adopted the Louisiana Rules of Professional Conduct to govern the conduct of attorneys appearing before it. Local Rule 83.2.4E.

The factors, derived from Louisiana Rule of Professional Conduct 1.5(a),[3] to be taken into consideration in determining the reasonableness of attorney's fees include: (1) the ultimate result obtained, (2) the responsibility incurred, (3) the importance of the litigation, (4) the amount of money involved, (5) the extent and character of the work performed, (6) the legal knowledge, attainment and skill of the attorneys, (7) the number of appearances involved, (8) the intricacies of the facts involved, (9) the diligence and skill of counsel and (10) the court's own knowledge. Richardson, 727 So. 2d at 707 (citing Rivet v. State Dep't of Transp. & Dev., 680 So.2d 1154, 1161 (La. 1996)).

"An award of attorney fees must be reasonable, based upon the degree of skill and work involved in the case, the number of court appearances, the depositions, and the office work involved." Gaston v. Bobby Johnson Equip. Co.. 771 So. 2d 848, 855 (La. App. 2d Cir. 2000) (citing Frentress v. Howard, 728 So. 2d 1019, 1022 (La. App. 2d Cir. 1999)). In determining a fee award, the court should consider the entire record, including

discovery, pretrial motions, the legal issues involved and the length of trial. Richardson, 727 So. 2d at 707.

The court will apply the above principles derived from both Delaware and Louisiana law to determine a reasonable fee in this case.

B. Plaintiff s Arguments in Opposition to the Fee Application Are Largely Meritless

American Express requests reimbursement of all of its attorney's fees incurred in defending plaintiffs lawsuit and bringing its counterclaims to judgment, for a total requested fee of $30,535.04. Defendant's attorney, Robert L. Walsh, of the law firm of Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P., has provided his declaration, Defendant's Exh. A, that the fees incurred are documented by an attached pro forma statement, which reflects contemporaneous time reports of services rendered. Defendant's Exh. B. Walsh avers that all services were billed at the customary hourly rates of each attorney and paralegal listed, and that these hourly rates are reasonable in this community for the type of work in this action. Defendant's Exh. A.

Shwartz first argues in opposition that American Express is not entitled to any attorney's fees because the presiding district judge did not specifically rule that American Express was so entitled in his order and reasons and original judgment. That argument has been laid to rest by the court's amended judgment entered on November 12, 2002, which specifically entered judgment in favor of American Express for its attorney's fees. Alternatively, plaintiff argues that

American Express must be limited to recovery of its reasonable attorney's fees pursuant to the two contracts. The Platinum Card Agreement permits defendant to recover 15% of the unpaid balance, while the Optima Card Agreement permits defendant to recover its reasonable attorney's fees.

Shwartz contends that American Express is not entitled to any fees for its efforts spent defending plaintiff s lawsuit, as opposed to amounts incurred in collecting the debts owed to American Express through its counterclaims. He asserts that he instituted this lawsuit, alleging a genuine contractual dispute, that it was not a suit for collection until American Express filed its counterclaims; that the contracts permit American Express to recover only its fees involved with collection and that American Express has not differentiated its time spent on these separate issues.

Plaintiff's argument is unpersuasive in several respects. First, in granting summary judgment to American Express on both plaintiff's claims and defendant's counterclaims, the presiding district judge ruled that the express language of the agreements defeated Shwartz's breach of contract claim. See Order and Reasons, Record Doc. No. 28, at pp. 6-7. Thus, even assuming that the presence of a "genuine dispute" over a contract could defeat a contractual entitlement to attorney's fees, the district judge has already determined that Shwartz presented no evidence to create a fact issue that such a genuine dispute existed.

Second, the cases cited by plaintiff are clearly distinguishable. In National Roofing & Siding Co. v. Giaise, 434 So. 2d 85, 87 (La. App. 5th Cir. 1982), the

court found partially in favor of the defendant homeowner, who was sued for payment of the complete purchase price, by deducting an offset from the purchase price. The court refused to interpret literally the contract terms regarding an award of attorney's fees "for collection." The court held that the plaintiff contractor was not entitled to contractual attorney's fees, even though plaintiff was awarded some of the damages it sought, because to do so would render the contract inequitable in light of the partial defects in the contractor's work that permitted the homeowner to refuse to pay the full purchase amount. In National Roofing & Siding Co. v. Gulf Coast Oil Co.. 422 So. 2d 204, 206 (La. App. 4th Cir. 1982), the same contractor sued for the balance of the contract price for a new roof, and the defendant shopping center counterclaimed for damages to its parking lot caused by the contractor. The court awarded defendant damages on its counterclaim and held that plaintiff could not collect its contractual attorney's fees even though it prevailed on its claim because the amount of the counterclaim award was commensurate with the amount owed on the contract. No similarly favorable circumstances exist for Shwartz, who lost on both his own claims and defendant's counterclaims.

Third, the contracts in this case do not limit recoverable attorney's fees only to those for simple collection of amounts owed by plaintiff, as plaintiff contends. The Optima Card Agreement provides:

Upon your default and subject to any limitation or requirements of applicable law, you agree to pay all our reasonable costs, including reasonable attorneys' fees incurred by us (1) in collecting the balance due,

including Finance Charges, if any, whether or not suit is brought against you, and (21 in protecting ourselves from any harm that we may suffer as a result of your default.

Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. C (emphasis added). The Platinum Card Agreement provides: "You agree to pay all court costs plus attorney's fees of 15% of the then unpaid balance if we must refer your account to an attorney who is not our employee, subject to the law of your jurisdiction." Defendant's Motion for Summary Judgment, Record Doc. No. 18, Exh. A (emphasis added).

By their plain terms, neither of these provisions limits American Express to recovering attorney's fees solely on its counterclaims. Shwartz was in default when he filed his lawsuit and American Express was forced to protect itself from harm caused by his default by hiring outside attorneys to defend the suit and to file counterclaims. Therefore, American Express was not required to segregate its fees between defense of plaintiff s suit and collection of the amounts owed on its counterclaims.

C. Reasonable Attorney's Fees

Shwartz finally argues that, at most, American Express should recover 15% of the total judgment amount of $68,879.53, or $10,331.93, in attorney's fees because that is the amount specified in the Platinum Card Agreement and any higher amount is unreasonable, based on the amount of work involved in this action. As the law outlined above indicates, the court is not

restricted under the circumstances presented in this case to the percentage provided in one of the applicable contracts, but instead is obligated to set a reasonable fee.

According to Walsh's declaration, American Express seeks fees for each attorney and paralegal at his or her customary hourly rates, for a total of $30,535.00 in fees. Defendant's Exh. A. Walsh's declaration gives the court scant information about the qualifications and experience of the three attorneys who were enrolled as counsel of record and, apparently, the two paralegals and one law clerk who also worked on this case.

However, the court has researched the qualifications of the attorneys through the Martindale-Hubbell and Jones Walker law firm websites. These sites reveal that Walsh is a partner with 15 years of experience in commercial litigation, having been graduated magna cum laude from Loyola University Law School in 1986 and having clerked for a Louisiana Supreme Court justice for one year. The pro forma statement reveals that Walsh's hourly rate was initially $200, increasing to $210 in January 2002. Defendant's Exh. B. Coleman D. Ridley, Jr., was graduated cum laude from Tulane University Law School in 1998 and has practiced for three years in general litigation, following one year of clerking for a state appellate court judge. His billing rate was $145 per hour. Antonio D. Robinson was graduated cum laude from Southern University Law Center in 1998 and has practiced for four years, primarily in employment-related litigation, in the firm's Baton Rouge office. His billing rate was initially $140 per hour, increasing to $145 per hour in 2002.

Although Walsh states that paralegals worked on the case, he does not provide their names, qualifications or billing rates in his declaration. The pro forma statement uses only initials to refer to the person who performed the work. It appears to the court, based on their hourly rates in the pro forma statement, that two paralegals and a law clerk worked on this matter. It appears that paralegal ALA billed at $55 per hour and paralegal LSBR billed at $65 per hour. It appears that BRLC (which, based on time entries, the court assumes refers to a Baton Rouge Law Clerk) billed at $80 per hour.

"Hourly rates are to be computed according to the prevailing market rates in the relevant legal market. . ." Hopwood v. State, 236 F.3d 256, 281 n.107 (5th Cir. 2000)(quotation omitted). Shwartz does not contest the reasonableness of the hourly rates charged by counsel for American Express.

An attorney's requested hourly rate is prima facie reasonable when he requests that it be computed at his or her customary billing rate, the rate is within the range of prevailing market rates and the rate is not contested. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 328 (5th Cir. 1995). Furthermore, my own experience in this court in reviewing and evaluating requests for awards of attorney's fees convinces me that the rates are within the range of attorney's customary billing rates in this legal community for attorneys with the skill, experience and qualifications of the three attorneys in this case and within the range of customary billing rates in this legal community for paralegals and law clerks. I find that the rates charged by each attorney, paralegal and law clerk for American Express are reasonable.

I next must consider whether the hours expended are reasonable. Shwartz asserts that many of counsel's time entries are too vague to be compensable.[4] To the contrary, I find that the entries are admirably well-documented.

Having considered the factors derived by the Louisiana and Delaware courts from their respective and identical Rules of Professional Conduct 1.5, I find that the hours billed are reasonable. These factors were analyzed as follows: (1) the time and labor required were not excessive, the questions involved were not novel or difficult, and the skill requisite to perform the legal service properly has already been taken into account in setting the attorneys' hourly rates; (2) acceptance of the employment did not preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services has already been taken into account; (4) the amount involved was not extraordinary and the results obtained were entirely successful on both defending against plaintiffs claims and asserting defendant's counterclaims; (5) there were no time limitations imposed by the client or by the circumstances; (6) American Express had an established professional relationship with the Jones Walker law firm; (7) the experience, reputation, and ability of the lawyers performing the service has already been taken into account in setting the hourly rates; and (8) the fee was fixed and is not a relevant factor.

Accordingly, I find that defendant's requested attorney's fees in the full amount of $30,535.00 are reasonable in this case.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that American Express be awarded its reasonable attorney's fees in the full amount of $30,535.00, plus interest thereon from the date of judgment until paid pursuant to 28 U.S.C. § 1961.

A party's failure to file written objections to the proposed findings, conclusions and recommendations in a magistrate judge's report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

New Orleans, Louisiana, this 20th day of December, 2002.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE

FOOTNOTES

[1] American Express fled its application for costs and noticed it for hearing before the Clerk of Court. Record Doc. No. 35. It does not appear that the Clerk has ever ruled on the application. Although this action is on appeal, that appeal does not divest this court of jurisdiction to rule on applications for attorney's fees and costs.

[2] Louisiana Civil Code article 2000 provides:

When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by Article 2924. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well.

La. Civ. Code art. 2000 (emphasis added).

[3] The Louisiana Rule and the Delaware Rule are identical.

[4] Some of the entries have been partially redacted by defendant's counsel to protect attorney-client privileged communications. Shwartz does not contest this practice.